

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CALIFORNIA DEPARTMENT OF WATER
RESOURCES,

Petitioner,

SOUTHERN CALIFORNIA EDISON
COMPANY,

Intervenor-Petitioner,

PUBLIC UTILITIES
COMMISSION OF THE STATE OF
CALIFORNIA; PACIFICORP,
Intervenors-Respondents,

SOUTHERN CALIFORNIA EDISON
COMPANY,

Intervenor,

DYNEGY POWER MARKETING, INC.,
Intervenor-Respondent,

EL SEGUNDO POWER L.L.C.; LONG
BEACH GENERATION L.L.C.;
CABRILLO POWER I L.L.C.;
CABRILLO POWER II L.L.C.; SOUTH
COAST AIR QUALITY MAINTENANCE
DISTRICT,

Intervenors,

IDACORP ENERGY L.P.,
Intervenor-Petitioner,

CORAL POWER L.L.C.;
CONSTELLATION POWER SOURCE,
INC.,

Intervenors-Respondents,

No. 01-71405
ORDER

PUBLIC SERVICE COMPANY OF
COLORADO; PINNACLE WEST
CAPITAL CORPORATION; ARIZONA
PUBLIC SERVICE COMPANY,
Intervenors,

MIRANT AMERICAS ENERGY
MARKETING, L.P.; MIRANT
CALIFORNIA L.L.C.; MIRANT DELTA,
L.L.C.; MIRANT PORTRERO L.L.C.,
Intervenors-Respondents,

PUGET SOUND ENERGY, INC.,
Intervenor,

NORTHERN CALIFORNIA POWER
AGENCY; TRANSMISSION AGENCY OF
NORTHERN CALIFORNIA; THE M-S-R
PUBLIC POWER COMPANY,
Intervenors-Respondents,

THE MODESTO IRRIGATION DISTRICT,
Intervenor-Petitioner,

THE CITY OF PALO ALTO,
CALIFORNIA; THE CITY OF REDDING,
CALIFORNIA,
Intervenors-Respondents,

THE CITY OF SANTA CLARA,
CALIFORNIA,
Intervenor-Petitioner,

CALIFORNIA INDEPENDENT SYSTEM
OPERATOR CORPORATION; MORGAN
STANLEY CAPITAL GROUP, INC.,
Intervenors-Respondents,

WILLIAMS ENERGY MARKETING &
TRADING COMPANY,

Intervenor,

MERRILL LYNCH CAPITAL SERVICES,
INC.,

Intervenor-Respondent,

PORTLAND GENERAL ELECTRIC
COMPANY; CALIFORNIA ELECTRICITY
OVERSIGHT BOARD,

Intervenors,

EL PASO MERCHANT ENERGY, L.P.,
Intervenor-Respondent,

THE PORT OF SEATTLE,
WASHINGTON,

Intervenor,

DUKE ENERGY NORTH AMERICA
L.L.C.; DUKE ENERGY TRADING AND
MARKETING L.L.C.,

Intervenors-Respondents,

THE CITY OF LOS ANGELES
DEPARTMENT OF WATER AND POWER,
Intervenor-Petitioner,

SEMPRA ENERGY TRADING
CORPORATION; AVISTA ENERGY,
INC.; CITY OF TACOMA,
WASHINGTON,

Intervenors,

PORT OF SEATTLE; CITY OF TACOMA;
PACIFIC GAS AND ELECTRIC
COMPANY; ENRON POWER
MARKETING INC.,

Intervenors-Respondents,

PUGET SOUND ENERGY; CALIFORNIA
INDEPENDENT SYSTEM OPERATOR
CORPORATION,

Intervenors,

v.

FEDERAL ENERGY REGULATORY
COMMISSION,

Respondent.

Filed February 24, 2004

Before: Mary M. Schroeder, Chief Judge,
Dorothy W. Nelson and William A. Fletcher, Circuit Judges.

ORDER

The only issue raised in the Federal Energy Regulatory Commission's ("FERC") petition for rehearing is whether this court lacked jurisdiction to review a FERC decision because it was not sufficiently final. Our opinion is reported at 341 F.3d 906 (9th Cir. 2003).

FERC argues that we do not have jurisdiction because the California Department of Water Resources ("DWR") sought judicial review of one issue in a FERC order, while simultaneously seeking agency reconsideration of separate, unrelated issues in the same order. FERC asks us to follow a D.C. Circuit case which held that "once a party petitions [an] agency

for reconsideration of an order, or any part thereof, the entire order is rendered nonfinal as to that party.” *Bellsouth Corp. v. FCC*, 17 F.3d 1487, 1489-90 (D.C. Cir. 1994).

The Ninth Circuit takes another view of finality. In *Steamboaters v. FERC*, 759 F.2d 1382, 1387-88 (9th Cir. 1985), we held that we had jurisdiction to review a FERC order. In that case, FERC had definitively resolved one issue, but a different issue was still pending before FERC because FERC had, in the same order, deferred decision on that issue. Under the rule in *Steamboaters*, the fact that one part of an agency order remains pending before the agency does not deprive this court of jurisdiction to review a discrete issue that has been definitively resolved by the agency.

Our court and other courts have cited the D.C. Circuit opinion in *Bellsouth* for the proposition that a petition for agency reconsideration by one party does not affect the right of other parties to seek judicial review. *See, e.g., Public Citizen, Inc. v. Mineta*, 343 F.3d 1159, 1170 (9th Cir. 2003); *Petroleum Communications, Inc. v. FCC*, 22 F.3d 1164, 1171 n.6 (D.C. Cir. 1994). *Bellsouth* also stands for the general proposition that a party cannot seek agency reconsideration and judicial review of the same issue at the same time. *See, e.g., Public Citizen*, 343 F.3d at 1170; *AirTouch Paging v. FCC*, 234 F.3d 815, 818 (2d Cir. 2000). We are unable to find any authority outside the D.C. Circuit, however, holding that a court is deprived of jurisdiction to review an issue definitively resolved by an agency when the party before the court has also sought agency reconsideration of a separate issue that happens to be addressed in the same agency order. DWR contends that not even the D.C. Circuit continues to follow that view. Its law is not entirely consistent in this area. *Compare Bellsouth*, 17 F.3d at 1489-90 (holding an entire order is rendered nonfinal when the party before the court petitions for agency reconsideration of any part of that order) with *Fourth Branch Associates v. FERC*, 253 F.3d 741, 746-47 (D.C. Cir. 2001) (holding that one action taken in an agency order was

final while at the same time holding that another action initiated in the same order was nonfinal).

Regardless of the law in the D.C. Circuit, this panel is bound by *Steamboaters*. Only the en banc court can reconsider Ninth Circuit law. *Murray v. Cable Nat'l Broad. Co.*, 86 F.3d 858, 860 (9th Cir. 1996). There are, moreover, sound reasons for our circuit to reject the view articulated in *Bell-south*, primarily because it has the potential to delay judicial review, possibly indefinitely. This is a particular danger where, as here, a single FERC order deals with myriad issues pertaining to DWR but unrelated to the issue that DWR wants this court to review. This risk of delay is enhanced because FERC follows a practice of denying motions for reconsideration and addressing previously unconsidered issues in the same order.

A review of the relevant agency proceedings in this case illustrates the point. After the June 19, 2002 FERC order in question, DWR sought either judicial or administrative review of three separate issues. It sought review in this court of the denial of rehearing of the outage control that we resolved in this appeal. It sought agency reconsideration, however, of two issues that were decided for the first time in the June 19th order. Because FERC followed its ordinary practice and resolved new issues while at the same time denying reconsideration of old issues, DWR could only accomplish its two objectives by simultaneously seeking agency reconsideration of some, and judicial review of other, discrete issues that FERC had resolved in the same order.

FERC's practice would create a problem if we were to adopt the approach to finality FERC now urges. If we were to hold that DWR could not seek judicial review until there were no issues pending agency rehearing, our holding could well force DWR to forego seeking agency reconsideration of issues or postpone judicial review until the day FERC issues an order that denies reconsideration without resolving any

new issues. The *Steamboaters* rule avoids this dilemma because it allows DWR first to seek agency reconsideration and, if unsuccessful, to seek prompt judicial review once issues have been definitively resolved by FERC. Therefore, we conclude that we properly exercised jurisdiction over DWR's petition for review of FERC's order denying reconsideration on the outage control issue.

For these reasons, the panel has voted to deny the petition for rehearing and the petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are denied.

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